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No. 04-939

IN THE

Supreme Court of the United States

MARY ANNE MCGUIRE, RUTH SCHIAVONE, AND JEAN B. ZARRELLA

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICAE CURIAE* DR. ALVEDA KING, MARLYNDA AUGELLI, SUSANNA BRENNAN AND NUMEROUS OTHER WOMEN TESTIFYING TO THE IMPORTANCE OF FREE SPEECH DURING THEIR ABORTION DECISIONS IN SUPPORT OF PETITIONERS

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Ms. Susanna Brennan

Ms. Cynthia Brown

Ms. Diane Doe*

Ms. Maria Doe*

Ms. Pilar Doe*

Ms. Rosemary Fedor

Dr. Gail Hayes

Dr. Alveda King

Ms. Bernadette Macy

Ms. Anita Manninen

Ms. Diane Penza

Ms. Esther Ripplinger

Ms. Amy Seltzer

Ms. Susan Swander

Ms. Molly White

Ms. Cindy Williamson

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INTEREST OF *AMICAE CURIAE* [1]

Amicae, who are listed on the inside cover and described in the Appendix, are women who attest to the importance of free speech in their abortion decisions. They include (i) women from Massachusetts who believe that the speech of the petitioners and pro-life counselors was invaluable to their life-altering choice of forgoing abortion, and (ii) post-abortive women who regret their lack of information during their decisions. All of these women believe that women contemplating abortion have the right to an uninhibited flow of information for their decisions. *Amicae* believe that laws like the one at issue here selectively and unconstitutionally restrict this flow of information to them and similarly situated women.

SUMMARY OF ARGUMENT

Women who have been in the position of patients at abortion clinics attest to the importance of free speech during their abortion decisions. These women understand from firsthand experience that the choice of whether or not to abort is one of the most difficult decisions that a woman must make. Yet all of these women agree on the vital importance of the petitioners' speech. Regardless of whether they are pro-choice or pro-life, they each personally testify to the fact that, at such an important and life-altering moment, women want as much information about their choice as possible and do not want the government selectively limiting how they can be provided that information in the public forum.

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[1] Counsel for both parties have consented to the filing of this *amicus* brief. Their joint notice of consent is on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. The Pro-Life Legal Defense Fund, Inc. contributed the printing costs associated with the preparation and submission of this brief. Unless otherwise noted, all statements made by *amicae* are on file with counsel for *amicae curiae*.

Indeed, this Court has emphasized that the First Amendment favors more information rather than less, especially on fundamental and deeply personal decisions. Women contemplating abortion thus have the right to an uninhibited flow of information. Moreover, this Court has consistently held that the First Amendment ensures that the state may not favor one speaker over another. Women thus have the right to hear information from all viewpoints—information about alternatives to abortion, as well as pro-clinic speech. As a result, the First Circuit's decision upholding the Massachusetts "buffer zone" law, which restricts the overall amount of speech and favors one viewpoint over another, not only deviates from this Court's First Amendment jurisprudence but, in so doing, significantly impairs the ability of women to make fully informed decisions.

ARGUMENT

I. WOMEN CONSIDERING ABORTION WANT ACCESS TO THE PETITIONERS' SPEECH.

All of the *amicae* attest to the importance of free speech in their lives and in their decisions. This speech performs the vital function of providing information for women contemplating abortion. As this Court has recognized, while the choice of whether or not to abort is among the most difficult decisions, women have a right to as much information as possible about their choice. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 67 (1976) ("The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned.").

A. Massachusetts Women Extol Petitioners' Speech as Invaluable to Their Life-Altering Choice of Forgoing An Abortion.

Many women in Massachusetts attest that the speech of the petitioners and pro-life counselors was indispensable to their abortion decisions. These include women whom the petitioners approached but would have been restricted from approaching if the buffer zone had been in effect at the time. For example, Maria Doe, Pilar Doe, and Kathleen Richard are all women from Massachusetts who were considering abortion before talking to and receiving information from the petitioners and pro-life counselors. These women believe that this speech was indispensable to their life-altering choices to forgo abortion.

Maria Doe chose to forego an abortion after talking with Mary Anne McGuire outside of an abortion clinic in New Bedford, Massachusetts. Mary Anne McGuire was only able to speak with Maria within six feet because, at the time, the New Bedford clinic had not painted the eighteen-foot lines that are statutorily required to activate the "buffer zone." Mass. Gen. L. ch. 266, § 120E½(c). Pilar Doe chose to forego an abortion after talking with pro-life counselors outside of an abortion clinic in Brookline, Massachusetts. A speech-related approach within six feet of Pilar was only able to occur because this clinic also had not demarcated the buffer zone at that time. Kathleen Richard, who was deposed earlier in this case, chose to forego an abortion after talking with pro-life counselors for several hours. The approach and conversation with Kathleen Richard occurred within six feet and thus would have been prohibited, but the buffer-zone statute had not yet been enacted. All of these women believe that the approach and speech of the petitioners and pro-life counselors were invaluable to their life-altering choices of forgoing abortion. However, now that that "buffer zone" is in effect, similarly situated women are restricted from receiving this same valuable information.

First, Maria Doe did not want to have an abortion but believed that she had no other choice before meeting Mary Anne McGuire. *See* Statement of Maria Doe ("I was 20 years old and I had lost my job in a factory. I didn't speak any English. People told me that it cost $8000 to have a baby . . . I did not want to have an abortion, but I thought I had to."). Maria arrived by taxicab at WomanCare, an abortion clinic in New Bedford, Massachusetts. Mary Anne McGuire was only able to approach and speak to Maria because WomanCare had never painted the statutorily-required lines to demarcate the buffer zone. If the buffer zone had been in effect, Mary Anne would have had to receive the consent of the taxi driver (since the taxi was parked within the eighteen-foot buffer zone) and then attempt to receive Maria's consent to approach in Spanish—which Mary Anne does not speak. Either of these bizarre requirements might have alarmed Maria before Mary Anne could hand her a pro-life booklet in Spanish.

Instead, because there was no buffer zone restricting Mary Anne's approach and speech, she was able to walk toward Maria and the taxi. Mary Anne handed Maria the booklet that contained information about abortion and possible alternatives. *See* Statement of Maria Doe ("[T]he booklet . . . showed me what an abortion really is. I didn't know that's what they did in the clinic."). Maria and Mary Anne had a long conversation, and, after having an ultrasound, Maria decided that she did not want an abortion. *See* Statement of Maria Doe ("Because of Mary Anne I did not make the mistake of having the abortion."); *id.* ("She said she would help my baby to be adopted, but I told her I wanted to keep my baby."). Maria and Mary Anne have now become friends, and Maria is grateful for the information that Mary Anne was able to give her. *See id.* ("The way Mary Anne talked to me was the right way because she gave me all the information about the abortion.").

Second, like Maria Doe, Ms. Pilar Doe also decided to forego abortion after speaking with pro-life counselors. Pilar Doe explains that the pro-life counselors "became like part of our family" but that "[i]f the people had to stay six feet away it would be different" because "[n]o one is going to listen to them." Pilar Doe explains that she found out that she was pregnant in late 2003. She was unemployed, had recently moved to Massachusetts from Haiti, and she and her husband were struggling financially. Although believing that abortion is wrong, Pilar felt that she had to have an abortion because she did not have any help. She went to an abortion clinic in Brookline, Massachusetts, but, after talking with several pro-life counselors, she eventually decided not to have the abortion. *See* Statement of Pilar Doe ("At first I didn't want to listen, but when they're close to you and they talk to you, you feel great."); *id.* ("We came home and thanked God for these people with tears in our eyes.").

Pilar contrasts the information that she was given by the pro-life counselors with the lack of information from her doctor and nurse. *Compare* Statement of Pilar Doe ("[The pro-life counselors'] information changed my life completely.") *with id.* ("Our own doctor didn't give me any advice [and] [t]he nurse just gave me a paper with one address, not two choices, not 'here's a place to go for counseling and they will help you with money.'"). Since her choice Pilar and the pro-life counselors have remained good friends. *See id.* ("People go for abortions because they don't know where to go to get help," but the pro-life counselors "not only give advice, they treat you like family.").

Third, like Maria Doe and Pilar Doe, Ms. Kathleen Richard of Massachusetts has been in the position of an incoming patient and chose not to abort after talking with pro-life counselors. In her deposition on behalf of Mary Anne McGuire and the pro-life petitioners earlier in this case, Kathleen Richard concludes: "[I]f they had been across the street, I would never have heard them say 'We will

help.'" Deposition of Kathleen Richard, *McGuire v. Reilly*, C.A. # 00-CV-12279-EFH, at *7 (D. Mass. Mar. 20, 2002). Kathleen Richard describes her own experience of walking into the clinic before her eventual choice not to abort:

> I had to walk by the protesters. . . . I heard one of them say, 'Please just talk to us. We are here for you. Whatever you need we'll help you.' I looked at [my friend] Marie and tears started streaming down my face. *This is what I wanted more than anything: someone to talk to, someone who would support me in all I was going though.*

Irene Langan, "A Tale of Twins: Two Living Miracles of Free Speech," Mass. Citizens for Life News, Vol. 21, No. 2 (1999) (Interview with Kathleen Richard) (emphasis added); *see also id.* ("If those people [the pro-life counselors] hadn't been there, what would have happened to me? . . . I didn't want to go through with the abortion, but I felt I had no choice in the situation I was in. I had no one to turn to. [The pro-life] volunteers gave me a choice.").

Women such as Kathleen Richard, as well as Maria Doe and Pilar Doe, who have directly benefited from the speech of the petitioners and pro-life counselors worry about the effect of the buffer-zone statute on similarly situated women searching for information. *See id.* ("There are other people like me, who feel they have no choice, and no support. What will happen to them if the pro-lifers aren't there? I needed them because I had no one else to turn to. They saved me that day, and they saved two other lives. If the Buffer Zone passes, women, children and families will suffer, and I needed to say that."); *see also* Statement of Maria Doe ("A law like [the buffer-zone statute] would make it difficult for a person like me who didn't know anything about abortion. It would be very, very sad if a person like me could not get this information.").

Thus, Maria, Pilar, and Kathleen all attest to the fact that free speech was both indispensable to their abortion decisions and one of the best things that ever happened to them. These Massachusetts women believe that similarly situated women also want access to this information and do not want the government selectively limiting the information that they are allowed to receive.

B. Numerous Post-Abortive Women Express Regret Over Their Lack of Information During Their Decisions.

Women who have undergone abortions often express regret over not receiving information during their decisionmaking process. These post-abortive women state that, in the pressure and confusion of their decisions, they wanted to have some information on alternatives, wished to hear a pro-life voice, or just wanted someone with whom they could have talked. These women provide firsthand accounts about (i) their lack of information, especially on alternatives to abortion, (ii) the limited viewpoint of the clinic and its employees, (iii) the internal confusion and external pressures they experienced, (iv) the unexpected negative effects of their abortions, and (v) how their decisions would have differed with more information.

First, these post-abortive women describe how they wanted more information at the time of their choices. *See, e.g.*, Statement of Susan Swander ("I had absolutely NO information prior to any of my 3 abortions. If I had gotten some—any—I may not have gone through with them"); Statement of Cynthia Brown ("Being an engineer, I feel that the more information and data in front of me the better, so that I may make an educated decision on my own . . . I did not receive any information."); Statement of Esther Ripplinger ("I am a woman who had an abortion because I

did not receive life-affirming information when I asked for it.").

Second, the women describe the clinic's unwillingness to provide any information on alternatives to abortion. *See, e.g.*, Statement of Bernadette Macy ("[T]he Planned Parenthood Clinic . . . gave me absolutely no supportive alternatives to having an abortion."); Statement of Amy Seltzer ("I had the abortion because I was not told of any alternatives. . . . This would have changed everything."); Statement of Esther Ripplinger ("At the clinic, I hoped they would give compassionate advice. . . . I was not made aware of the many community services available for pregnant women."); Statement of Molly White ("I did not know any information . . . about abortion alternatives or crisis pregnancy centers where I could go for information and help. If I would have had this information I would have made a more informed decision and would not have chosen abortion.").

In addition, many women feel that, in addition to the clinic providing them with no alternatives, the clinic personnel either stonewalled or actively misled them. *See, e.g.*, Statement of Molly White ("The abortion clinic workers did not give me any factual information when I asked for it. . . . I based a life taking, life altering decision on the lack of factual information."); Statement of Rosemary Fedor ("[B]efore going to the abortion clinic they had advised me, over the phone, not to look at or take anything from people outside the clinic."); Statement of Bernadette Macy ("Planned Parenthood didn't give me a clue about how wonderful being a mother is and I believe they are in the business of making money from abortion."); Statement of Susanna Brennan ("I remember the counselor, in a condescending, authoritative way, telling us in no way could we afford a baby. . . . There was no other information given to us at all—nothing about getting financial and other assistance, what the actual act of abortion was, or what the

after effects would do to us. She presented it in a way that there was no other choice. Period.").

Third, these post-abortive women testify that they would have benefited from more information because other psychological, familial, and sometimes even physical pressures were impairing their ability to choose. *See, e.g.*, Statement of Anita Manninen ("I had an abortion when I was 15 years old, scared and stupid."); Statement of Rosemary Fedor ("At that time I was a very scared and confused girl."); Statement of Esther Ripplinger ("I was a scared 19 year old who wanted to please people. My boyfriend and his family told me to get an abortion. I did what I was told."); Statement of Diane Doe ("The young man who was four years older than me pressured me to seek an abortion."); Statement of Dr. Alveda King ("There was adverse pressure and threat of violence from the baby's father.").

Fourth, these women also regret that they did not receive any information on abortion's possible side effects in their lives. *See, e.g.*, Statement of Susan Swander ("I was never informed of what I might experience after the abortions. My consent was not informed."); Statement of Amy Seltzer ("I was not told of the risks to me . . . . This would have changed everything."); Statement of Cynthia Brown ("I did not receive any information regarding the . . . physical, psychological or emotional effects after an abortion from the abortion clinic."); Statement of Anita Manninen ("Our marriage, my life and my heart were torn apart and ruined because, a. I was not given the correct information, b. nor was I ever told that there could be a better way instead of aborting.").

Fifth, these women describe how their decision would have been different with more information. *See, e.g.*, Statement of Susanna Brennan ("I believe if someone had approached us outside of the clinic, I would be a proud parent today."); Statement of Marlynda Augelli ("If given

the choice again I would today have a thirty one year old child."); Statement of Bernadette Macy ("Now that I am better informed, know my legal rights, and the support systems that are nationwide, I would have never stepped into that horrible clinic."); Statement of Molly White ("If someone was there to talk to me and give me this information I would have decided against abortion."); Statement of Dr. Alveda King ("I truly wish that I had received more information about abortion prior to my decision. . . . I would never have had an abortion.").

Overall, as these post-abortive women attest from their firsthand experiences, women who have undergone abortions often regret their lack of information during their decisionmaking process. The Massachusetts buffer-zone statute, by differentially restricting information in general and speech on alternatives in particular, does a disservice to all women who are searching for essential information about their choices.

II. THE FIRST AMENDMENT PROTECTS PRIVATE SPEECH THAT ENABLES WOMEN TO MAKE INFORMED CHOICES.

As demonstrated above, women considering abortion have a vital interest in information about their choices. These women do not want the government selectively limiting how they can be provided that information in the public forum. The First Amendment prevents the government from doing just that by protecting all private speech—regardless of viewpoint—in order to facilitate informed decisionmaking.

Two fundamental principles of this Court's First Amendment jurisprudence protect the free speech rights of the petitioners and the corresponding interests of women. First, the First Amendment favors more information rather than less information, especially on fundamental and deeply

personal decisions. Women contemplating abortion have a direct interest in the uninhibited flow of information. Second, the First Amendment ensures that the state does not favor one speaker over another. Women have the right to hear information from all viewpoints—information on alternatives to abortion, as well as pro-clinic speech. The First Amendment thereby protects the interests of women in making fully informed decisions.

A. Women Have the Right To More Information Rather Than Less Especially On Fundamental Decisions.

Women considering abortion have the right to an uninhibited flow of information about their choice, and the First Amendment prevents the government from limiting private speech that assists this informed decisionmaking. Indeed, this Court has emphasized the vital importance of having unrestricted access to information for individual decisionmaking. *See Peel v. Att'y Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 108 (1990) ("The [government's] authority is necessarily constrained by the First Amendment to the Federal Constitution, and specifically by the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information."); *see also* Martin H. Redish, *Freedom of Expression: A Critical Analysis* 22 (1984) (noting that "[f]ree speech aids all life-affecting decisionmaking, no matter how personally limited, in much the same manner in which it aids the political process.").

This Court has been particularly cognizant of the importance of information for decisionmaking in the context of abortion. *See Ohio v. Akron Ctr. for Reproductive Health* (*Akron II*), 497 U.S. 502, 520 (1990) (emphasizing the importance of information for "the profound philosophic

choices confronted by a woman who is considering whether to seek an abortion" because "[h]er decision will embrace her own destiny and personal dignity, and the origins of the other human life that lie within the embryo"); *Danforth*, 428 U.S. at 67 ("The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences.").

This Court's recognition of the benefits of more information in the context of abortion can be contrasted with the experience of other countries—such as Hungary—that in the past have been far less concerned about the opportunity for women to make fully informed decisions. *See* Judit Sandor, *From Ministry Orders Towards Constitutional Debate: Lessons Drawn from the Past 50 Years of Abortion Laws in Hungary*, 18 Med. & L. 389, 396 (1999) ("Women did not receive sufficient medical information before obtaining abortions; potential disadvantages of the procedure, and alternatives to it, were not explained to them adequately. Most women believed that it carried no risk. Concern for reproductive health was totally missing from the health care system, in no small part because the gynaecologists and obstetricians in Hungary are almost exclusively men.").

In contrast to the information-restrictive Hungarian regime, "France and other countries require [that each] pregnant woman must be given information about alternatives to abortion, opportunities for counseling, and material assistance should she decide to continue the pregnancy." Mary Anne Glendon, *A Beau Mentir Qui Vient De Loin: The 1988 Canadian Abortion Decision In Comparative Perspective*, 83 Nw. U. L. Rev. 569, 583 (1989). While this Court's jurisprudence has similarly allowed some *governmental* speech to assist women in their decisions, see *Planned Parenthood v. Casey*, 505 U.S. 833, 878, 882-883 (1992), the Court has been even more

concerned with assisting women by preventing governmental restrictions on *private* speech concerning fundamental choices. *See Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."); *cf. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (quoting *Board of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.)).

Indeed, even in the traditionally less-protected area of commercial speech, the Court has stressed, "[i]n case after case following *Virginia Bd. of Pharmacy*," the important connection between speech and individual decisionmaking by emphasizing the "importance of free dissemination of information," "the antipaternalistic premises of the First Amendment," and the "impropriety of manipulating consumer choices or public opinion through the suppression of . . . information." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 520 (1996) (Thomas, J., concurring) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) and subsequent opinions by Justices Blackmun, Brennan, Kennedy, Marshall, Powell, Rehnquist, Stevens, and White). It follows *a fortiori* that the First Amendment protects *non-commercial* speech—such as the speech of the petitioners—that concerns individual decisionmaking on fundamental choices such as abortion. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 n.18 (1981) (noting that a statutory scheme that "impacts more heavily on ideological than on commercial speech" is "a peculiar inversion of First Amendment values") (quoting *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 15-16 (1st Cir. 1980)).

The First Amendment thus safeguards the individual decisionmaking power of women by protecting their interests as listeners and prevents the government from selectively limiting information. *See Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982) ("[T]he right to receive ideas follows ineluctably from the sender's First Amendment right to send them"); *Virginia State Board of Pharmacy*, 425 U.S. at 756 ("[T]he protection afforded is to the communication, to its source and to its recipient both."); *see also* Charles Fried, *Saying What the Law Is: The Constitution in the Supreme Court* 80 (2004) ("[T]he First Amendment protects the interests of both speakers and listeners, so that the right of people to annoy others with messages they would rather not hear—as for instance in the case of protesters swarming about the entrances to abortion clinics, or religious or political solicitors ringing doorbells—is just as protected from government interference as the right to read a book or watch a film. . . . So the free speech right protects two distinct rights: my right to expression and your right to be the target of my expression. It protects communication.").

B. Women Have the Right To Hear Information From All Speakers Regardless of Viewpoint.

Women contemplating abortion have a constitutionally protected interest in hearing speech from all viewpoints—from the viewpoint of the petitioners as well as the viewpoint of the clinic's personnel. It is axiomatic that the First Amendment prohibits the government from favoring one speaker over another. *See Rosenberger v. Rector*, 515 U.S. 819, 828 (1995); *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 97 (1972); *see also* Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 1155 (14th ed. 2001) ("restriction of the expression of a particular point of view [is] the paradigm violation of the First Amendment.").

"Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger*, 515 U.S. at 828-829 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens on speech because of its content")); *see also Hudgens v. N.L.R.B.*, 424 U.S. 507, 520 (1976) ("Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

Viewpoint-neutrality is particularly important for women's decisionmaking in the context of abortion because the "First Amendment values of self-governance and personal decision-making are undermined by the government taking a side on the abortion issue and seeking to indoctrinate the public with its viewpoint." Janet Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and The First Amendment*, 101 Harv. L. Rev. 1916, 1933-1334 (1988) (concluding that "neutrality promotes women's equality interests and furthers both freedom of conscience and political decisionmaking.").

Indeed, in *Hill* itself the Court emphasized that viewpoint-neutrality was a necessary prerequisite for maintaining the constitutionality of any buffer-zone statute:

> [T]he relevant First Amendment point is that the statute would prevent both [pro-abortion and anti-abortion] speakers, unless welcome, from entering the 8-foot zone. The statute is not limited to those who oppose abortion. . . . It applies to all 'protest,' to all 'counseling,' and to all demonstrators[,] . . . whether they oppose or support . . . [the] abortion decision. *That is the level of neutrality that the Constitution demands.*

Hill v. Colorado, 530 U.S. 703, 725 (2000) (emphasis added); *see also id.* at 719 (relying on "the State Supreme Court's unequivocal holding that the statute's 'restrictions apply equally to all demonstrators, regardless of viewpoint'").[2]

The Massachusetts buffer-zone statute, by contrast, clearly does not satisfy this necessary prerequisite of viewpoint-neutrality. Both on its face and as applied, the Massachusetts statute permits pro-clinic speech while proscribing pro-life speech.

On its face, the plain text of the buffer-zone statute specifically exempts all "employees or agents of [the clinic] acting within the scope of their employment" and all persons "entering or leaving" the clinic. Mass. Gen. L. ch. 266, §120E½(b)(1)-(2), (4). The first exemption—the "scope of employment" exemption—ensures that any privileged speech will necessarily express the clinic's view. The second exemption—the "entering or leaving" exemption—similarly distinguishes speakers based on viewpoint because those entering or leaving the clinic will be doing so on the clinic's business or with its permission. These two exemptions, which allow pro-clinic speech while restricting pro-life speech, make the Massachusetts statute unconstitutional on its face because, as this Court has consistently recognized, "an exemption from an otherwise permissible regulation of speech [that] 'attempt[s] to give one side of a debatable public question an advantage in expressing its views to the people'" is unconstitutional. *City*

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[2] Many commentators have questioned whether the buffer-zone statute in *Hill* actually met this stringent standard of neutrality. *See, e.g.*, Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 1220 (14th ed. 2001) (questioning whether "the law in *Hill*, by requiring listeners affirmatively to consent to speech, ha[s] the likely effect of discriminating in favor of popular or widely accepted messages and against those that are unorthodox or unpopular, where the speaker must initiate contact because the listener will not"); *see also* Pet. p. 24 n.8.

of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 785-786 (1978)).

As applied, the statute also permits pro-clinic speech while restricting pro-life speech. To take just one simple example of the overt disparity in the statute's application, clinic employees and their agents are entirely free to (and frequently do) approach women without consent to say, "You don't have to listen to them," while the petitioners cannot approach women without consent to say, "You don't have to listen to them"—the exact same words. *See, e.g.*, C.A. App. 479-480 (escorts "pretty regularly tell them they don't have to listen to us"); *id.* at 497-501 (noting regular escort statements such as "You don't have to pay attention to these people," "Stay away from them," and "You don't have to listen to this B-I-T-C-H."); *see also* Pet. p. 8-9 (citing a plethora of examples from the record in which pro-life speech is suppressed while pro-clinic speech is allowed).

Thus, the Massachusetts buffer-zone statute, both on its face and in its application, clearly does not satisfy "the level of neutrality that the Constitution demands." *Hill*, 530 U.S. at 725. By upholding the statute, the First Circuit Court of Appeals not only deviated from this Court's First Amendment jurisprudence but, in so doing, significantly impaired the ability of women to receive information beneficial for making informed decisions. In respectfully submitting this brief in support of the petitioners' First Amendment claim, *amicae* express their desire that the Court protect their rights, and the rights of women similarly situated, to receive information equally from all sources without selective government interference.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

DESCRIPTIONS OF *AMICAE*

Dr. Alveda King, the daughter of civil rights activist Rev. A.D. King and the niece of Dr. Martin Luther King, Jr., had one involuntary and one voluntary abortion in the 1970's. Her first abortion was performed by her private physician without her consent; she "did not ask for and did not want an abortion." Her second abortion was "voluntary" but undergone as a result of "adverse pressure" and the "threat of violence" from the father; she explains that the clinic personnel also misled her by making false assurances. She now believes that every woman has "a right to know the serious consequences and repercussions of making a decision to abort her child" because "when women have information, they can make informed and wise choices."

Ms. Marlynda Augelli had an abortion in 1974 and regrets that she had "no information" about the life of the child. She indicates that she wishes that she had been "told the truth" because, if she had known anything about the life of the unborn child or if she had more information about childbirth and being a mother, she "would have never made the choice to end the life of [her] first child."

Ms. Susanna Brennan had an abortion in 1975 in Brighton, Massachusetts. She recalls "the counselor, in a condescending, authoritative way, telling us in no way could we afford a baby. . . . There was no other information given to us at all—nothing about getting financial and other assistance, what the actual act of abortion was, or what the after effects would do to us. She presented it in a way that there was no other choice. Period." Ms. Brennan explains that her abortion caused her and her husband to "individually self-destruct" and eventually separate. She believes that "if someone had approached us outside of the clinic, I would be a proud parent today and perhaps even married to my husband."

Ms. Cynthia Brown had an abortion in 1990. As an engineer, she believes that "the more information and data in front of me the better, so that I may make an educated decision on my own." However, she did not receive any information regarding her baby's stage of development or the physical, psychological, or emotional effects after an abortion. In counseling other women, she now conveys the importance of taking time to think through the crisis, obtaining reliable information, talking with someone trustworthy, and praying before making a decision that will affect the rest of one's life.

Ms. Diane Doe* had abortions in 1972 and 1973 and considers herself among those "not given the facts prior" to her abortions. At the time, she says that she was "scared, uneducated about how an abortion was performed, and had not read any books on pregnancy or talked to anyone about it." She "had no understanding of what the word 2nd trimester meant when a Planned Parenthood person told [her] that 'time was of the essence.'" She believes that she was "misled" and that it was an "injustice that we were not fully informed prior to making a life and death decision of such great magnitude."

Ms. Maria Doe* chose to forego an abortion after talking with Mary Anne McGuire outside of an abortion clinic in New Bedford, Massachusetts. She was only able to speak with Mary Anne McGuire within six feet because, at the time, the New Bedford clinic had not painted the eighteen-foot lines that are statutorily required to activate the "buffer zone." She concludes that "[t]he way Mary Anne talked to me was the right way because she gave me all the information about the abortion. A law like [the buffer-zone statute] would make it difficult for a person like me who didn't know anything about abortion. It would be very, very sad if a person like me could not get this information."

Ms. Pilar Doe* chose to forego an abortion after talking with pro-life counselors outside of an abortion clinic in Brookline, Massachusetts. The pro-life counselors would

not have been able to speak to her within six feet except that the Brookline clinic had not demarcated the buffer zone lines at that time. She explains that the counselors "became like part of our family" but that "[i]f the people had to stay six feet away it would be different" because "[n]o one is going to listen to them." She indicates that "[t]heir information changed my life completely because it made me think differently. Now we have a better life because of them."

Ms. Rosemary Fedor had an abortion in 1997 and "did not receive any pro-life literature," even though this "could have possibly changed my mind." The abortion clinic had advised her not to look at or take anything from the sidewalk counselors outside the clinic. She says that "[l]ooking back I wish I would have known; they were there to help me not hurt me."

Dr. Gail Hayes had abortions in 1977 and 1978 and did not receive any pro-life information. She explains she might have changed her mind if she knew that there were other options, but that she only received information from the clinic's personnel. At the time, she wanted to know what actually happens during the abortion. After suffering physical and emotional pain as a result of her abortions, her goal now is to help others "discover the truth about abortion and its aftermath."

Ms. Bernadette Macy had an abortion in 1993 and recalls that Planned Parenthood "gave me absolutely no supportive alternatives to having an abortion." She felt that she was "in such a vulnerable position" that she would have been open to "any hopeful, encouraging, positive word" to have the child. She regrets that "there is no warning to young women about . . . what Planned Parenthood actually does."

Ms. Anita Manninen had an abortion when she was fifteen and, in her words, "scared and stupid." She believes that her later problems with drugs, drinking, promiscuity, and eventually divorce were directly attributable to her abortion. She concludes that her marriage, her life, and her

heart were "torn apart and ruined" because she was "not given the correct information [and] [n]ever told that there could be a better way instead of aborting."

Ms. Diane Penza had an abortion in 1980 and "did not receive any pro-life information before [she] went into the clinic." She wishes that she would have had "someone to talk to" because she explains that her only reason for having the abortion was that her husband at the time was on heroin and it seemed like the best thing to do.

Ms. Esther Ripplinger had an abortion at the age of nineteen because she "did not receive life-affirming information when [she] asked for it." She hoped that the clinic would give compassionate advice. However, she explains how she was not made aware of the many community services available for pregnant women. Instead, she was "sold" abortion as a "quick-and-painless, routine procedure" and was erroneously told that "beyond this point" (viz., the laminaria procedure) "you must not change your mind."

Ms. Amy Seltzer says that she had an abortion in 1995 because she was not told of any alternatives. She explains that if she would have been told of the risks to herself or what would be done to her child, this would have "changed everything." She notes that, while there were pro-life people outside the clinic, "they were seperated [sic] by a wall and several yards away so they could not come into contact with me."

Ms. Susan Swander says that she had "absolutely NO information" prior to any of her three abortions in 1968, 1974 and 1991. She states that "[m]y consent was not informed," and believes that, if she had gotten some information, she may not have gone through with the abortions. While formerly an "ardent pro-choice advocate" for over thirty-six years, one of her current goals is to try to get more information to parents who may be considering abortion. She states that, because "I was never informed of what I might experience after the abortions," "I will do my

part to make sure that *all* information is provided to women who are considering an abortion."

Ms. Molly White had abortions in 1981 and 1985 but says that, if someone was there to talk to her and give her more information, she would have made an "informed decision" and "would not have chosen abortion." She lacked any information on fetal development, abortion procedures, and the risks of abortion, as well as any information about alternatives or crisis pregnancy centers. She recalls that "[t]he abortion clinic workers did not give me factual information when I asked for it." Instead, she says that she based a "life taking, life altering decision on the lack of factual information," and concludes that "[t]hey deceived me and I fell for it." She believes that her children would be alive today if there had been sidewalk counselors in front of the clinics where she went to have her abortions.

Ms. Cindy Williamson had an abortion at the age of twenty-one but, after the abortion, turned to a life of "destructive behavior." Her addiction to drugs and alcohol resulted in the loss of her job, loss of custody of her daughter, and an overall feeling of not caring about anything. She says that, while her daughter was the most important thing in her life before she had the abortion, afterward she felt as if she did not deserve to be a mother. For two years, she has now been a volunteer at a pregnancy care center to help counsel women who come in for a pregnancy test.